CORRECTED COPY

Office Supreme Court, U.S.
FILED
MAR 17 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963-4

NO. 925

WILLIAM L. HEUER, JR.

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA, AND FOR EXTRAORDINARY WRITS DIRECTED TO SUCH COURTS AND TO THE CRESCENT RIVER PORT PILOTS' ASSOCIATION; FOR CERTIORARI OR AS A PETITION FOR PROHIBITION, MANDAMUS, OR OTHER ADEQUATE WRITS.

JOHN M. HOLAHAN and
JANET MARY RILEY,
Attorneys for Applicant,
William L. Heuer, Jr.,
420 Whitney Building,
New Orleans, Louisiana 70130

HAUSER PRINTING CO., INC., NEW ORLEANS

INDEX OF
PETITION FOR WRITS OF CERTIORARI

	PAGE
Motion for Leave to File	1
Petition for Certiorari, and Extraordinary Writs	3
Reference to Opinions	3
Jurisdiction	3
Questions for Review	4
Law	4
Facts	5
Federal Question Pleaded	8
Argument	9
On Application for Extraordinary Writs	15
Judgment of Court of First Instance	21
Reasons for Judgment	22
Opinion of Fourth Circuit Court of Appeal	27
Opinion of Supreme Court of Louisiana	34

INDEX OF RECORD

	PAGE
Original Petition of William L. Heuer, Jr.	5
Copy of Rule 24 of Crescent River Port Pilots' Association	13
Notice of Hearing by Crescent River Port Pilots' Association	14
Letter of Crescent River Port Pilots' Association's Refusing Subpoena	15
Rule of Board of River Port Pilots' Commissioners	16
Written Stipulations	19
Original Answer of Crescent River Port Pilots' Association	21
Reasons for Judgment Court of First Instance	32
Judgment	36
Notice of Appeal	37
Oral Stipulations	40
Opinion of the Fourth Circuit Court of Appeal	45
Application for Rehearing	52
Refusal of Rehearing	54
Application for Writs of Certiorari and Review to the Supreme Court of Louisiana	55
Denial of Application for Writs of Certiorari and Review by the Supreme Court of Louisiana	70
Copy of Louisiana R.S. 34:991, et seq.	Back Cover
Exhibits—separately bound	

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963-4

NO. .....

WILLIAM L. HEUER, JR.

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA, AND FOR EXTRAORDINARY WRITS DIRECTED TO SUCH COURTS AND TO THE CRESCENT RIVER PORT PILOTS ASSOCIATION; FOR CERTIORARI OR AS A PETITION FOR PROHIBITION, MANDAMUS, OR OTHER ADEQUATE WRITS.

Motion for Leave to File Petition for Writ of Certiorari and Extraordinary Writs

John M. Holahan, and Janet Mary Riley, counsel for petitioner above named, respectfully move this Court for leave to file the petition for writ of certiorari, hereto annexed, under 28 U.S.C. § 1651, directed to the Supreme Court of Louisiana to review judgments of such courts

more particularly described in the petition and for such other extraordinary relief as therein requested.

March . . . , 1964.

JOHN M. HOLAHAN,

JANET MARY RILEY,
Attorneys for Applicant,
420 Whitney Building,
New Orleans, Louisiana 70130

Petition for Certiorari, and Extraordinary Writs

The petition of William L. Heuer, Jr., with respect prays that the court issue writs of certiorari; and other extraordinary writs directed to the Honorable Supreme Court of Louisiana to the end that the record of this matter be ordered forwarded to the court for review, and reversal of prior judgments of such courts be ordered for the reasons hereafter expressed.

Reference to Opinions

That opinions in this matter were given in the Civil District Court for the Parish of Orleans, State of Louisiana, where the matter originated and in the Fourth Circuit Court of Appeals for the State of Louisiana, which decision is cited as 158 So. 2d 221 and in the Supreme Court of Louisiana, denying an application for a writ of certiorari and review of the latter court's decision and whose memorandum decision is cited in 159 So. 2d 288.

Jurisdiction

The judgment of the Supreme Court of Louisiana, denying an application for a writ of certiorari, was January 20, 1964, and the statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28:1257 U.S. Code. Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

1) * * *

2) * * *

3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States."

Questions for Review

Th constitutional question of law is: Does an incorporated association, contemplated by Louisiana law, consisting of all of a class of state officers who enjoy **exclusive** right to pilot vessels engaged in foreign trade entering and departing the Port of New Orleans, and maintaining the system of pilotage for such trade, in fact and in law perform a state action? And, if so, is such action subject to the 14th amendment to the United States Constitution in regard to due process of law? And can due process of law be possible where such association lacks subpoena power, power to compel oaths, is directly financially interested in the outcome of its determinations, allows parties responsible for decision-making to absent themselves while testimony is received, gives inadequate notice, and is the composite instigator, prosecutor, judge, jury and executioner of its own actions?

Another question of law is: Can the Crescent River Port Pilots' Association block Heuer in the performance of his duties as a state officer? This is the basis for the writ of quo warranto and the action for intrusion into office. There is no dispute about the fact that Heuer cannot operate in his state appointed office of River Port Pilot. Where did the association get the authority to suspend state officers?

Another question of law presented is: If the association has the authority to suspend a River Port Pilot, did it properly exercise this authority?

Law

Law pertaining to the case involves: The Constitution of the United States, Amendment 14; Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

> of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Revised Statutes of Louisiana; Title 34, Navigation and Shipping; Chapter 6, Pilots; Part 1, Port of New Orleans; Sub-Part B, River Port Pilots, cited as La. R.S. 34:991 et sequendam can be found in the rear of the record in the pocket part of West's publication of the Revised Statutes.

The Rules of the Board of River Port Pilot Commissioners for the Port of New Orleans, pages 16, 17 and 18 of the record.

The rules numbered 24 and 25 of the Crescent River Port Pilots' Association, page 13 of the record. The charter and by-laws of this association are found in the exhibits forwarded to this Court under separate cover from the Clerk of the Civil District Court.

Facts

William L. Heuer, Jr. was the annually elected president of defendant Association from September, 1958, through September, 1962. After he left office the new Board of Directors filed suit #407-866 in the Civil District Court for the Parish of Orleans against him and another former officer of the association seeking an accounting for certain funds allegedly expended by Heuer on behalf of the association during his tenure in office. No further steps to prosecute this suit to a conclusion have been taken. No pleadings were filed by Heuer. This

suit was filed January 9, 1963. A copy of this suit is an exhibit.

On March 13, 1963, Heuer received from the Association the letter notifying him that the Association was taking action against him as outlined in this letter, (Record pg. 14) in an internal extra-judicial "hearing."

Heuer complains that this method of action against him denied him due process of law, which, he claims, he is entitled to by constitutional guarantee.

The facts as borne out in the admissions in the defendant's answer, pg. 24 Record, and in the written, pg. 19 Record, and oral pg. 39 et seq. stipulations entered, are not in dispute. Heuer is a duly appointed, commissioned and qualified River Port Pilot and is a member and shareholder of the Crescent River Port Pilots' Association which maintains the system of pilotage for River Port Pilots, maintaining a stationhouse at Pilottown, small boats, communication systems, etc. The Association, through an internal extra-judicial hearing, has suspended Heuer for one year from May 27, 1963, and such suspension renders him unable to perform his duties as River Port Pilot, although other types of pilotage services may be available to Heuer. It is admitted that the association's extra-judicial hearing was transcribed and accurately reflects what took place at the hearing. It is admitted that the Association lacks the power to compel attendance of witnesses at its hearing, and lacks the power to compel any witness to take an oath, pg. 40. It is further admitted that one of the judges (Board of Directors) left the hearing while in progress for five minutes, pg. 20, and that the judges (Board of Directors) at the hearing will gain some Four Hundred and 00/100 ($400.00) Dollars each as a result of Heuer's suspension, pg. 20.

Act 54 of 1908 of the General Assembly of Louisiana (now R.S. 34:991) created the Board of River Port Pilot Commissioners for the Port of New Orleans, established the state office of River Port Pilot, designated the body of such pilots to be the River Port Pilots, and authorized such pilots to form themselves into an association. One month after Act 54 of 1908 became law, the Crescent River Port Pilots' Association was formed and it is the body of pilots known as River Port Pilots and it runs the system of pilotage over which River Port Pilots maintain the exclusive right to pilot ocean going vessels engaged in foreign trade.

The Congress of the United States would have, if it desired to legislate thereon, the right to regulate pilotage since it is specifically vested with the right to regulate commerce with foreign nations and among the several states. Article 8, United States Constitution. However, in the absence of legislation by Congress, Louisiana had the right to and did so regulate pilotage by establishment of River Port Pilots, who are vested with a portion of the sovereign duty of the state itself, the exclusive right to pilot ocean going vessels. Congress has seen fit to legislate in the field of pilotage for ships engaged in interstate (coastwise) trade. It has stated that vessels so engaged may be piloted by anyone holding a license from the Coast Guard as a first class pilot, tonnage unlimited. All River Port Pilots hold such licenses. However, there are others who are not River Port Pilots who hold such licenses. Hence, River Port Pilots are those pilots created by the State of Louisiana who enjoy exclusive right to pilot ocean going vessels engaged in foreign trade.

It is stipulated, Page 40, that, as suspended, Heuer is unable to perform his duties as a River Port Pilot,

but could obtain pilotage as a coastwise pilot or on a tugboat. The reason for this stipulation is because the association runs the only system of pilotage through which a River Port Pilot can operate. It does not, however, run the only system of pilotage for coastwise traffic. Heuer, as suspended, cannot perform his state appointed duties of his office of River Port Pilot, but can pilot coastwise vessels as a result of his holding the license from the Coast Guard. He is denied an income of $30,000 per year and the use of his invested capital and other rights enuring to a shareholder of defendant Association.

Federal Question Pleaded

This matter was heard in the Court of the first instance and decision rendered against Heuer. It was then appealed to the Fourth Circuit Court of Appeals, the appellant tribunal for the court of the first instance. Both of these Courts wrote opinions, and application for writ of certiorari to the Supreme Court of the State of Louisiana was made and denied.

The federal question was raised originally in the original petition of Heuer in Articles 9, 10 and 11 thereof.

The court of the first instance in its opinion stated that no constitutional rights of Heuer had been denied because Heuer had adequate notice of the Association's hearing and an opportunity to be heard. The court did not touch upon Heuer's other contentions regarding Heuer's opportunity to present evidence in his behalf, the financial interests of the Board of Directors and the temporary absence of one of the board members. These points were again raised in the appeal to the Fourth Circuit Court of Appeals and although Heuer's contentions were noted in the opinion, they were not discussed by the Court because the Court felt that Heuer had seem-

ingly waived his right to due process by his refusal to testify at the board hearing. This refusal to testify was, of course, made after the conditions alleged in Heuer's petition became known to him.

The Supreme Court of the State of Louisiana in its memorandum opinion refusing writs simply stated that it felt that there was no error of law in the Court of Appeal.

This constitutional question has been urged from the outset of this matter and through all of the appellate courts and is again urged to this Court.

Argument

The Crescent River Port Pilots' Association is an Arm of the State of Louisiana

The inaction of Congress in extending its legislative power into the field of pilotage for vessels engaged in foreign commerce left the State of Louisiana free to do so, which it did in the creation of River Port Pilots, R.S. 34:991 et seq. Louisiana contemplated the creation of the "private" corporation known as the Crescent River Port Pilots' Association in R.S. 34:992:

> River port pilots; duties; appointment
>
> There shall be a body of pilots known as the "River Port Pilots", whose duty it shall be to pilot vessels between Pilottown and New Orleans, the members of which shall be pilots duly appointed by the Governor and qualified hereunder, and whose number shall not be less than twenty. * * *

and in R.S. 34:995:

> **Association** of river port pilots
>
> The said river port pilots may form themselves into an association as to them may seem fit, not in

> conflict with law, or with the rules and regulations of the river port pilot commissioners, but nothing shall affect any association presently existing.

and prohibits the formation of any competitive associations in R.S. 34:1075. This Association enjoys this state-created monopoly and perpetuates itself in this position, cloaked in the protection afforded to it in the case of *Kotch v. Bd. of River Port Pilots' Com'm*, 209 La. 737, 25 So. 2d 527, aff'd 330 U.S. 552 (1947) in a 5 to 4 decision of this Court.

Where a state has taken such action, afforded such privileges and protects same from competition there can be little doubt that state action is involved, and Louisiana acts through the Crescent River Port Pilots' Association.

The Fourteenth Amendment's Scope includes Action of the Crescent River Port Pilots' Association

The plain language of the 14th Amendment makes it mandatory that due process be granted by the State of Louisiana acting through the Crescent River Port Pilots' Association to Heuer.

This Court has stated in *Marsh v. Alabama*, 326 U.S. 501 that the state cannot prosecute a person for exercising his constitutionally protected right to disseminate religious pamphlets in a "private" company-owned town, even though the company refused permission to disseminate such information. Certainly Heuer's constitutional right to due process of law should be equally protected as was the right to disseminate information.

Again in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, this Court held that the prohibitions of the 14th Amendment apply in situations involving "private conduct abridging individual rights" where "to some sig-

nificant extent the state in any of its manifestations has been found to have become involved in it." Certainly the State of Louisiana in enacting, authorizing, protecting and regulating its system of pilotage through the medium of the Crescent River Port Pilots' Association is sufficiently involved in the Association's "private conduct" to have the prohibitions of the 14th Amendment applied to such conduct.

Throughout this matter the Crescent River Port Pilots' Association, aided by dicta in *Kotch v. Board of River Port Pilots' Commissioners*, 209 La. 737, 25 So. 2d 527, admits the facts of Heuer's petition, as shown in the stipulations, but denies that such insufficiencies deny due process to Heuer, because it runs for the cover of being a "private" corporation.

The state courts also have determined the Association's action to be "private" and done in accordance with its charter and by-laws, which the courts have characterized as having been done "honestly and fairly". The courts did not touch upon either the necessity for or the application of due process. The courts have evaded these issues because they held the Association to be "private" and not impressed with the obligations of the 14th Amendment.

This is the error which Heuer seeks to correct.

The United States Supreme Court did not hold in its 5-4 decision in the *Kotch* case that the Association was "private", as the Louisiana Courts held. This Court decided that Kotch was not denied equal protection of the law by allowing Louisiana to use a system of nepotism in the selection of pilots. This decision was made after careful consideration of the unique position of pilots. This Court in *Kotch* cut right through the subterfuge of the

Crescent River Port Pilots' Association and its selection of pilots and went directly into the question of equal protection of the law, which it decided adversely to Kotch's position.

The acts complained of in Heuer's original petition in Article 11b, c, d, and f were the subject of stipulations.

The admission that the Association lacks the power to compel process and testimony under oath leaves it without the machinery necessary to grant due process. This court has held

> "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with judicial process." *Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960)

There can be little doubt that the Association has affected Heuer's right to pursue his occupation of a River Port Pilot. See *Banjavich v. La. Licensing Bd. for Marine Divers*, 237 La. 467, 111 So. 2d 505, 511, (1959) and *State v. La. State Bd. of Medical Examiners*, 238 La. 502, 115 So. 2d 833, 844 (1959). Heuer is denied the right to solicit business R.S. 34:1003.

The admitted fact that the individual members of the Board of Directors had a direct financial interest in the actions of the Association against Heuer denied him due process of law. This Court has held that

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might bid him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law. *Tumey v. Ohio*, 273 U.S. 510 (1927).

This same principle is again found in Davis, Administrative Law Text 220 (1958) as follows:

> One who stands to gain or lose personally by a decision either way is disqualified by reason of interest to participate in the exercise of judicial functions. Most of the law concerning disqualification because of interest apply with equal force to judges and to administrative adjudications * * *. A direct pecuniary interest, if substantial is ordinarily held to disqualify an officer from participation in an adjudication.

While it was not stipulated that the Board of Directors was prejudiced against Heuer, it was shown that their previous actions in filing a suit for an accounting contained the same charges as the internal extra-judicial notice of the hearing. The same Board of Directors who brought the suit for accounting, and made the charges internally against Heuer, sat in judgment of their own actions. This predetermination of what were the facts was a mental attitude of the Board of Directors which precluded an open mind, which is so necessary for due process. In the minds of the Board of Directors, Heuer was guilty when he lost the annual election, when they filed suit against him and when they sought to penalize him internally.

Louisiana courts have held that pursuit of an occupation is a property right and that a license is a property right. See *Banjavich v. La. Licensing Bd. for Marine Divers*, 237 La. 467, 111 So. 2d 505, 511 (1959) and *State v. La. State Bd. of Medical Examiners*, 238 La. 502, 115 So. 2d 833, 844 (1959). Heuer as suspended is unable to pursue his occupation, and unable to advertize. Louisiana frowns on competitive pilot associations R.S. 34:1075.

The Louisiana courts, while silent on the subject of due process in this case have obviously fallen into the error

set up in the *Kotch* case wherein the state courts had mistakenly held that the Association was a "private" corporation; by their action on the subject of due process, one can only conclude that they were unable to appreciate the high degree of state involvement in Association action. Once it is established that the "hearing" and resultant suspension were state action, it is felt that state courts would easily find the denial of due process under the facts.

The state courts have implied by Heuer's refusal to testify at the Association's "hearing" on grounds of self-incrimination, some sort of illegality or presumption of guilt on his part. It should be remembered that this constitutional guarantee was exercised in what proved to be in effect a penal proceeding, and was done only **after** it was apparent that the Association could not afford due process to Heuer, and not before.

The Association answers the other questions involved in this matter by reference to its charter and its by-laws.

It is submitted that this answer is not sufficient. As a matter of government it is impossible for a voluntary association of individuals, be it public or private, to bestow upon itself control over a state office, without an express grant of such authority by the legislature. This is exactly what the Crescent River Port Pilots' Association has done and is continuing to do.

It is submitted, that on the showing presented, it is clear that Heuer is suffering from a lack of required due process of law which has never been afforded to him. The prohibitions of the 14th Amendment of the U. S. Constitution have and are being violated.

Act 54 of 1908 in addition to creating the office of River Pogt Pilot, created the Board of Commissioners of the River Port Pilots, who qualify persons to the Gover-

nor for the office of River Port Pilot and hear complaints against River Port Pilots and recommend action to the Governor. This board on May 11, 1963, reserved to itself disciplinary powers over River Port Pilots. This was prior to the association's hearing and its suspension of Heuer. The Association acted contrary to the rules of the Board of Commissioners in imposing the suspension. The lower court excused this action stating that the board had no power to adopt such disciplinary powers, and that its rules were ex post facto. If the power to discipline a state officer is anywhere, should it be in the state agency or a voluntary association? La. R.S. 34:995 contemplates rules and regulations being enacted by the board. The rules of the board were not ex post facto since they were enacted prior to the hearing itself and to the imposition of the suspension.

In addition, the only by-law of the association which permits suspension is Rule 24 which says that a pilot can be suspended only for "conduct unbecoming a pilot." This is the only penal provision of Rule 24. As a matter of contract between Heuer and the association the definition of "conduct unbecoming a pilot" becomes important. Assuming, arguendo, that Heuer was guilty of the action charged in the notice of March 24, 1963, did this action have anything to do with his being a pilot? As a penal provision this by-law should be strictly construed against the imposition of a penalty, and the association should not be allowed the self-assumed right to interpret the by-laws in an unreasonable manner.

On Application for Extraordinary Writs

Heuer, through the procedure outlined above, has exhausted all attempts through the state courts to obtain the relief requested in his original petition. Record pg. 9. Through the actions of the Crescent River Port

Pilots' Association, he is suffering the penalties imposed. He has never had any method of appealing this action, as such, to any court other than by method of requesting the writs of injunction, mandamus and quo warranto, which have been refused by the state courts. He is willing and capable of posting bond, should this Court consider such necessary.

On May 27, 1964, the sentence imposed on Heuer by the Crescent River Port Pilots' Association will have run its course, and the matter before this court may well be moot. Therefore, Heuer moves for writs necessary to grant the relief requested at least until the matter is heard or passed upon by this court.

This court is empowered to grant such relief.

"U.S.C. 28:1651 Writs

a. The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

b. An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Heuer has not ever had an opportunity to appeal suspending the action of the Crescent River Port Pilots' Association. There is no such thing as an appeal from this action no matter what bond or security he might offer. The action, obviously penal in nature, under Rule 24 of the Association, Record pg. 13, admits of no method of bond. Accused felons have a right, in all but the most serious cases, to seek a bond which will suspend execution of the sentence imposed until finally determined by the courts. Certainly Heuer deserves an opportunity to air his case

before this court with the sentence suspended until final determination by this court. The Association, enjoying, as it does, full dominion and control of Heuer's future actions as a pilot, can in the future impose the unserved time on Heuer, should its actions be held valid. If this court should pass upon the petition for writs of certiorari and review, and grant such writs prior to May 27, 1964, it should in aid of its announced intention to exercise its jurisdiction grant such needful writs and decrees necessary to an orderly determination of the controversy. This can only be accomplished by suspending the penalties imposed by the Association. Heuer attaches hereto and makes part hereof the record and exhibits. All parts of this petition are applicable to his petition for certiorari and review as well as for relief by way of extraordinary writs."

Your petitioner respectfully submits that the writ of certiorari should issue to the end that this Court may review the decision of the Fourth Circuit Court of Appeals for the State of Louisiana, and the decision of the highest court of Louisiana, the Supreme Court of Louisiana in its refusal to grant certiorari and relief of the latter court's decision, and determine whether such courts by their action or inaction and the Crescent River Port Pilots' Association have deprived petitioner of due process of law, and whether petitioner is entitled to due process of law.

Your petitioner further submits that such needful writs as are necessary and proper issue in order to aid the court's jurisdiction and suspend execution of the penalties presently being imposed by the Crescent River Port Pilots' Association on William L. Heuer, Jr. during the interval before determination of the issuance of certiorari, and after issuance of certiorari, if granted and until the matter is finally and completely adjudicated.

Your petitioner further moves the court for permission to file this petition for certiorari as a petition for mandamus and or prohibition should certiorari be not deemed an appropriate method for review. Petitioner further prays for all such proper and adequate writs, orders, judgments and decrees necessary to grant the relief demanded in the form and substance outlined in the original petition in the Civil District Court for the Parish of Orleans.

JOHN M. HOLAHAN,

JANET MARY RILEY,
Attorneys for Applicant,
William L. Heuer, Jr.
420 Whitney Bldg.,
New Orleans, La.

Responsive pleadings, if any, must be filed within thirty days.

Service accepted, all rights reserved.

March , 1964.

Supreme Court of Louisiana
Supreme Court Building
New Orleans, Louisiana

Clerk of Court

by

Crescent River Port Pilots' Association

by

Henry J. Read,
Montgomery, Brown, Barnett & Reed,
Attorneys at Law
National Bank of Commerce Bldg.
New Orleans, Loiusiana

COPY OF OPINIONS

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 412-560
Division "E"
Docket "5"

WILLIAM L. HEUER, JR.

VS.

CRESCENT RIVER PORT
PILOTS' ASSOCIATION

JUDGMENT

This cause having been heretofore tried, and submitted to the Court for adjudication, the law and evidence being in favor of defendant for the written reasons herein filed and made part of the record;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Crescent River Port Pilots' Association, and against the plaintiff, William H. Heuer, Jr., denying his petition at his costs.

JUDGMENT READ AND RENDERED IN OPEN COURT ON JUNE 20th 1963.

JUDGMENT READ AND SIGNED IN OPEN COURT ON JUNE 20th 1963.

s/ Howard J. Taylor
JUDGE.

No.
Filed Jun 20 1963
/s/ John R. Doyle
Deputy Clerk
Civil District Court

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 412-560
DIVISION "E"
DOCKET 5

WILLIAM L. HEUER, JR.

VS.

CRESCENT RIVER PORT
PILOTS' ASSOCIATION

REASONS FOR JUDGMENT

William L. Heuer, Jr., a duly licensed and qualified River Port Pilot, commissioned by the Governor of Louisiana and licensed as a First Class Pilot, tonnage unlimited by the United States Coast Guard, Bureau of Marine Inspection and Navigation; sues for writs of injunction, mandamus and quo warranto. Plaintiff also claims that he has effectively been deprived of his position as a river port pilot, and seeks to be reinstated to that position.

The Crescent River Port Pilots' Association was formed under the authority of Act 54, 1908, LSA-R.S.

34:995, and the membership of the Association is composed only of commissioned river port pilots. The Association has almost exclusive control of the system through which pilots are furnished to shipping interests in the area of the Port of New Orleans. The procedure of the Association is based on the maintenance of a "work-wheel" which determines when a pilot gets an assignment, and the location of his assignment.

From October 22, 1958 to September 21, 1962, Plaintiff was President of the River Port Pilots' Association, and also was President of the Board of River Port Pilot Commissioners. The Association had an audit of the affairs of the Association conducted by F. W. Lafrentz & Co., which audit covered the period during which plaintiff was President of the Association. This audit showed that some $237,476.51 of expenditures were unaccounted for and unsupported and unexplained. Part of this sum, $127,550.00, consisted of checks made payable to the plaintiff, for which checks no explanation was given. On the basis of this discovery, the Association sent a letter to the plaintiff on March 13, 1963, charging him "with conduct unbecoming a member of the Association, conduct tending to bring discredit upon the Association, and conduct prejudicial to the best interests of the Association." The specific grounds for the charges were listed as follows:

> "1. You have while serving as President of the Association from October 22, 1958 to September 21, 1962, expended the funds of the Association without proper authority.
>
> "2. You have failed to comply with the request of the Association's Board of Directors for an accounting of the unsupported expenditures made by you during the period October 22, 1958, to September 21, 1962, as reflected in the Audit

> of F. W. Lafrentz & Co., Certified Public Accountants, dated November 17, 1962, copy of which has been furnished to you heretofore."

The letter also notified plaintiff of the date of the hearing which was to be held.

At the hearing which was held on May 20, 1963, plaintiff refused to testify, relying on the constitutional privilege against self-incrimination. The Board, acting under Rule 24 of the By-Laws, Rules and Regulations of the Association, found plaintiff guilty of the charges and suspended from the Association for one year.

Plaintiff claims that his constitutional rights have been denied because of several reasons, among which was inadequate notice and opportunity to be heard. Plaintiff also claims that the Association exceeded its powers in that:

> "a) it has no power to suspend or impair the office of River Port Pilot, which it did not create, nor have any appointive authority thereover; and alternatively,
>
> "b) that its actions were greater than that allowed in its own charter and by-laws which proscribe a penalty only for 'conduct unbecoming a pilot' (Rule 24, Sect 2) which bears no relationship or connection with the charges made in the notice sent to Heuer."

The allegation is made that the Association's action was also in conflict with the rules of the Board of River Port Pilot Commissioners, which rules allegedly reserve unto that Board the right to discipline a pilot.

This Court is of the opinion that the plaintiff has been denied no constitutional rights by the action of the

Association. The notice sent to plaintiff was adequate notice, and plaintiff had ample opportunity to be heard and to explain his actions.

Certainly, the pursuit of a legal occupation is a property right of which one cannot be divested without due process, but in this case plaintiff has *not* been divested of his right to follow his lawful calling. He has merely been suspended, not ousted, from membership in a private corporation for just cause. Plaintiff still is a licensed, commissioned River Port Pilot, and as such may still act as a pilot on ships. There are numerous avenues open to Plaintiff to pursue his occupation. Thus, the plaintiff has not been deprived of his property without due process.

That the Association had the right and power to suspend Plaintiff is now beyond question. In *Kotch v. Board of River Port Pilot Commissioners*, S. Ct. La. 1946, 25 So. (2d) 527, the Court states on page 533 that:

> "* * * The Pilots Association is a private corporation organized under the general corporation laws of the State * * *.
>
> * * * There is nothing in the law which requires the Crescent River Port Pilots Association to admit to its membership persons not of their selection * * *."

If there is nothing in the law which prevents the Association's denying membership, based on the corporation rules, then there is certainly no law preventing the Association's suspending of a pilot's membership.

As to the comparative powers of the Association and the River Port Pilot Commissioners, the Commission's powers are enumerated in the statutes, LSA R.S. 34:991 et seq. The so-called Rules of the Board of River Port

Pilots Commissioners, adopted May 11, 1963, which attempted to limit the disciplinary powers of the Association are invalid and inapplicable to the present case. They are invalid in that they go far beyond the provisions of the statutes applicable to the Commissioners, and they are inapplicable in that they were passed after the present proceedings were initiated by the Association under the Association rules. It is to be noted that these ex post facto provisions were passed just prior to the hearing, were passed by the Board of Commissioners consisting of Captain Heuer, Richard Dietze, and Charles Schwalb, Jr. These three persons were also directors of the Association during the plaintiff's term as President of the Association.

The purpose of the Board of Commissioners is stated by the statutes to be that of examining applicants and controlling conduct of pilots while they are aboard ships. All other areas of discipline and control are available to the Association, and the rules of the Association are binding upon each member of the Association. Since Plaintiff voluntarily joined the Association, he is presumed to have made himself familiar with the rules of the Association, and especially those rules pertaining to discipline and control of the membership.

The Association has not acted unreasonably, but has acted according to the clear and purposeful by-laws and rules of the Association. Therefore, plaintiff's petition will be denied at his costs.

New Orleans, Louisiana, June 20th, 1963.

/s/ Howard J. Taylor
JUDGE

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

No. 1271

WILLIAM L. HEUER, JR.

VERSUS

CRESCENT RIVER PORT
PILOTS' ASSOCIATION

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, No. 112-569, DIVISION "E", HON. HOWARD J. TAYLOR, JUDGE

LOUIS H. YARRUT
JUDGE

(Court composed of Judges Louis H. Yarrut, L. Julian Samuel and Henry E. Turner, pro tempore)

Dec 2 1963

JOHN M. HOLAHAN,
for Plaintiff-Appellant

MONTGOMERY, BARNETT, BROWN and READ,
HENRY J. READ,
for Defendant-Appellee.

AFFIRMED.

Plaintiff takes this appeal from a judgment of the district court refusing to reinstate him as a member of Defendant-Association. Defendant-Association is a private corporation created by authority of the Louisiana Legislature under LSA-R.S. 34:995, and recognized as such in the case of Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans, 209 La. 737, 25 So. 2d 527. Defendant-Association has adopted a charter and by-laws, the pertinent provisions of which, applicable here, are as follows:

"ARTICLE XI.

"The Board of Directors shall have the following powers:

"(a) To make such expenditures and to sell and purchase property for the Association not exceeding One Thousand ($1,000.00) Dollars in any one instance; provided that by a petition addressed to the Board of Directors and signed by a majority of the members, the Board of Directors shall have the power in its discretion to make the expenditures and to sell and purchase property for the Association in such amounts as may be authorized by the petition or necessary for compliance with the petition; and

"(b) To make such by-laws, rules and regulations for the government and discipline of the members of the Association, and for the conduct and management of its business, sanctioned by such fines, pains and penalties as in their judgment shall be deemed wise, proper and necessary, and which shall not be inconsistent with law or the provisions of this Charter.

"A majority of the Board of Directors shall constitute a quorum to act for the Association in the particulars set forth above and in all other matters in this Charter specified, except where

the unanimous consent of all of the Directors is required. Notice shall be given to each director of the date, time and place of each meeting of the Board sufficiently in advance to afford reasonable opportunity for all members to be present."

Under the above charter provisions the Board of Directors adopted Rule 24 of its by-laws, reading:

"Sec. 1. It shall be the duty of the Board of Directors to enforce all rules and regulations and the Board of Directors shall have supervision over the conduct of the members of this Association, and whenever any member shall be found guilty of conduct unbecoming a pilot, or shall do any act or thing which tends to bring discredit upon the Association, or be prejudicial to the best interest of the Association, th Board of Directors shall have the power to try such offending pilot, after giving him notice in writing of the acts complained against, and giving him a reasonable time to appear for trial before the Board of Directors.

"The Board of Directors shall have the power, when any member is found guilty of conduct unbecoming a pilot, to assess a fine of not less than one day's pay and not more than thirty days' pay, or, the Board may suspend the offending member for not less than on month, nor more than twelve months, and the Board shall have the power in addition, to assess a fine equal to the costs of the trial."

Plaintiff failed to account for some $237,476.51 of the Defendant-Association's funds during his 43-month tenure as President; of which amount $127,550.00 was represented by checks drawn to his own order and signed by him. He persisted in his refusal to explain these expenditures, notwithstanding he was given the official audit by the Defendant-Association's certified public accountants.

Plaintiff, under the authority of the charter and by-laws, was then given notice to appear before the Board of Directors, on a date and hour named, to answer to the following charges:

> "1. You have while serving as President of the Association from October 22, 1958 to September 21, 1962, expended the funds of the Association without proper authority.
>
> "2. You have failed to comply with the request of the Association's Board of Directors for an accounting of the unsupported expenditures made by you during the period October 22, 1958 to September 21, 1962 as reflected in the Audit of F. W. LaFrentz & Co., Certified Public Accountants, dated November 17, 1962, copy of which has been furnished to you heretofore."

Upon receiving this letter Plaintiff asked Defendant's Board to summon certain witnesses. The Board stated it had no authority to summon witnesses, but would be very glad to permit any witnesses Plaintiff brought to testify in his behalf under oath. On the day and hour fixed for the hearing Plaintiff announced that his witnesses would not appear and testify because they would not testify under oath. When Plaintiff was asked to explain the basis and reason for the unexplained expenditures of $237,476.51 of Defendant's funds, particularly the $127,550.00 payable to him, he refused to give any explanation on the ground that his answers might tend to incriminate him. In effect, he pleaded the constitutional Fifth Amendment. As a result, he was found guilty of the charges and suspended for one year, the maximum suspension the Board of Directors could impose.

The basis for Plaintiff's demand that the court order him restored to membership is that his constitutional rights were denied, viz:

"a. because the notice of the hearing failed to adequately inform petitioner with sufficient particularity just what the charges made, or action sought to be penalized, were; and petitioner could not, therefore, prepare a defense.

"b. because the association lacks the power and inclination to compel process to gain the attendance of witnesses sought by petitioner, and such association has refused to seek the attendance of such witnesses, all as per letter of the association dated May 16, 1963, attached.

"c. because the hearing was conducted by the Board of Directors, declaring at the outset that no witnesses would be heard without their first being sworn which cut off petitioner's opportunity to present evidence in his behalf by witnesses who did not wish to be placed under oath by other fellow pilots, and the association was powerless to compel these witnesses to take an oath.

"d. because the very Board of Directors who sat in judgment on petitioner at this hearing had a direct financial interest in the outcome. The earnings of each of them would increase upon petitioner's suspension.

"e. because members of the Board of Directors, by their previous actions has shown itself to be prejudiced against petitioner, thereby denying to petitioner an impartial judging authority.

"f. because members of the Board of Directors absented themselves from the hearing during the hearing."

While one may refuse to answer any questions that may tend to incriminate him in a criminal proceeding, he cannot refuse to answer questions concerning his official conduct in connection with a duty he owes as officer or director of a private corporation, without subjecting him-

self to the civil remedies of such corporation for such breach and refusal. Under the charter and by-laws, the Board of Directors had a right to suspend him. His failure to explain his expenditures was tantamount to an admission of their illegality. Hughes v. Department of Police, 131 So. 2d 99; La. Business Corporation Law, LSA-R.S. 12:36, reading as follows:

> "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation, and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment, and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

Plaintiff contends that his suspension as a member of Defendant-Association prevents him from earning pilot fees of $30,000.00 a year. While his suspension as a member may have that effect, for all practical purposes his license to act as a pilot can be issued or revoked only by the Governor of the State, under LSA-R.S. 34:991-993.

The general rule in Louisiana is that the courts will not interfere with the internal affairs of a private association so long as its affairs and proceedings are conducted fairly and honestly, and after due notice to anyone involved.

Walsh v. New Orleans Cotton Exchange,
188 La. 338, 177 So. 68;

Elfer v. Marine Engineers Beneficial Ass'n No. 12,
179 La. 383, 154 So. 32;

Irwin v. Lorio,
169 La. 1090, 126 So. 669;

State ex rel Rhodes Mortician & Undertaking Co.
v. New Orleans Funeral Directors' Ass'n,
161 La. 81, 108 So. 132;

Braden v. Lewis.
148 La. 920, 88 So. 117.

As the Board of Directors acted in accord with the charter and by-laws of Defendant, after due notice and ample opportunity given Plaintiff to explain the charges against him, which he declined solely on the ground his answers might tend to incriminate him, the action of the Board in suspending him was correct.

For the reasons herein assigned, the judgment appealed from is affirmed; Plaintiff to pay costs in both courts.

AFFIRMED.

SUPREME COURT OF LOUISIANA
NEW ORLEANS

No. 47,[illegible]
January 20, 1964

WILLIAM L. HEUER, JR.

V.

CRESCENT RIVER PORT
PILOTS' ASSOCIATION

In re: William L. Heuer, Jr. applying for certiorari or writ of review to the Court of Appeal, Fourth Circuit, Parish of Orleans

Writ Refused.

There is no error of law in judgment of the Court of Appeal.

s EHMcC
s JBF
s JBH
s WBH
s JWS
s FWH
s FWS

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, January 20, 1964.

s Harold A. Moise, Jr.
Deputy Clerk

[SEAL]

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
APR 23 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963-4

NO. 925

WILLIAM L. HEUER, JR.

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

PETER H. BEER,
Counsel for Respondent,
Crescent River Port
Pilots' Assn.,
806 National Bank of
Commerce Bldg.,
New Orleans, La. 70112.

Of Counsel:
MONTGOMERY, BARNETT,
BROWN & READ
HENRY J. READ
DANIEL LUND

MONTGOMERY & CO., "THE BRIEF SPECIALISTS", N.B.C. BLDG., N. O., LA.

INDE

The Proceedings Below
Statement of the Case
The Questions Presented
Argument
Conclusion
Certificate

TABLE OF STA

Louisiana Revised Statutes
12:36
34:992
34:995
34:997
34:1001
34:1004

TABLE OF C

Braden v. Lewis, 88 So. 117, 1
1921)
Crowder v. Dieu Nous Protege
Association, 146 So. 710,
Elfer v. Marine Engineers Be
So. 32, 179 La. 383 (S. Ct
Elfer v. Marine Engineers
So. (2d) 409 (Ct. of App
Fitzgerald v. Davis, 160 So.
1964)
Hughs v. Department of Poli
App. 1961)
Irwin v. Lorio, 169 La. 1090,
Kotch v. Board of River Po
209 La. 737, 25 So. (2d
330 U.S. 552 (1947)

PAGE

1
2
6
6
12
13

UTES CITED

7, 8
8
7, 11
10
11
11

SES CITED

La. 920, (S. Ct. of La.
11
Benevolent Mutual Aid
La. App. 1933) 11
eficial Association, 154
of La. 1934) 11
neficial Association, 7
of La. 1942) 11
d) 345 (La. App.
7
, 131 So. (2d) 99 (La.
8
26 So. 669 (1930) 12
. Pilot Commissioners,
527 (1946). Affirmed.
7

TABLE OF CASES CITED—(Continued)

	PAGE
Levine v. Michel, 35 La. Ann. 1121 (S. Ct. La. 1883)	7, 9
Louisiana Mortgage Corp. v. Pickens, 167 So. 914 (La. App. 1936)	8
New Founded Industrial Missionary Baptist Organization v. Anderson, 49 So. (2d) 342 (La. App. 1950)	11,
State, ex rel. Rhodes Mortician & Undertaking Co. v. New Orleans Funeral Directors Association, 108 So. 432, 161 La. 81 (S. Ct. of La. 1926)	11
State, ex rel. Breaux v. Longshoremen's Protective Union Benevolent Association, Local No. 231, 123 So. 344 (La. App. 1929)	12
Tumey v. State of Ohio, 273 U.S. 510, (1927)	9
Walsh v. New Orleans Cotton Exchange, 188 La. 338, 177 So. 68	11

OTHER AUTHORITIES

Fletcher Cyclopedia, Corporations, Vol. 12 A, Section 5704, page 643	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963-4

NO.

WILLIAM L. HEUER, JR.

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

THE PROCEEDINGS BELOW

On May 20, 1963 petitioner herein, William L. Heuer, Jr., a member of the Crescent River Port Pilots' Association was tried before the Association's board of directors, pursuant to the by-laws of said association, on charges of misconduct, found guilty, and suspended from the Association for one year. The charges against petitioner arose out of an audit of the books of the Association which revealed that $237,476.51 of the Association's money was unaccounted for, the shortage having developed during petitioner's 43 months tenure as the Association's president. Of this shortage $127,550.00 was represented by checks drawn to the order of petitioner himself. Petitioner was afforded numerous opportunities to account for these funds before the hearing which resulted

in his suspension was convened, and then during the course of the hearing itself. He refused to make any accounting whatsoever, and pleaded the provisions of the Fifth Amendment of the United States Constitution as justification for his refusal to explain to his fellow members of the Association what he had done with their money during his tenure as president. Nowhere in any of the pleadings or the briefs filed by petitioner in the trial court, or the Court of Appeals for the Fourth Circuit, State of Louisiana, or the Supreme Court of the State of Louisiana, is there a word in which petitioner denies his guilt of the charges made against him by the Association. Again in his petition to this court petitioner has carefully avoided any consideration of his guilt or innocence of the charges made and proved against him.

STATEMENT OF THE CASE

From the exhibits which have been filed in their original form, it will be seen that the petitioner is complaining of the fact that he has been suspended from the Association for the period of one year. In spite of the grave nature of the charges against him, there has been no effort to expel the petitioner, because there was no provision for expulsion in the charter and by-laws of the Association. The record shows the care with which the Association's Board adhered strictly to the provisions of its charter and by-laws, in charging and trying the petitioner. Hence, the controversy concerns merely petitioner's suspension. The suspension resulted from an audit covering the affairs of the Association for the annual periods ending on June 30 of the years 1959 through 1962. The audit revealed the shortages which led the Board of Directors of the Association to prefer charges against petitioner in the form of the following letter:

"March 13, 1963

"Captain William L. Heuer, Jr.
4979 Mandeville Street
New Orleans 22, Louisiana

Dear Captain Heuer:

Pursuant to RULE 24 of the BY-LAWS, RULES and REGULATIONS of the CRESCENT RIVER PORT PILOTS ASSOCIATION, you are hereby charged with conduct unbecoming a member of the Association, conduct tending to bring discredit upon the Association, and conduct prejudicial to the best interests of the Association, in that:

1. You have while serving as President of the Association from October 22, 1958 to September 21, 1962, expended the funds of the Association without proper authority.

2. You have failed to comply with the request of the Association's Board of Directors for an accounting of the unsupported expenditures made by you during the period October 22, 1958 to September 21, 1962 as reflected in the Audit of F. W. Lafrantz & Co., Certified Public Accountants, dated November 17, 1962, copy of which has been furnished to you heretofore.

Please be advised that the Board of Directors will conduct a Hearing into these charges on Wednesday, March 27, 1963 at 10:00 A. M. You will be advised of the place of the Hearing in due course.

Yours very truly,

R. E. McNeely, President"

The audit revealed a total of $237,476.51 in expenditures for which proper support could not be found in the records of the Association. This sum is comprised of the various items which appear on Schedules 1, 2, 3, 4 and 5 of the audit (pages 28 through 40 of Exhibit Q). With

negligible exceptions all of the checks listed in these schedules were signed by petitioner and one J. H. Hanson (see page 21 of the transcript of the proceedings before the Board of Directors of the Association on May 20, 1963). The Court's special attention is requested to Schedule 2 on pages 29 and 30 of Exhibit Q which lists checks payable to petitioner himself from December 3, 1959 to May 29, 1962 in the aggregate amount of $127,550.00. No explanation whatsoever has ever been submitted by petitioner regarding his expenditure of these funds.

Petitioner was repeatedly asked for an explanation of the unsupported expenditures in the schedules referred to in the audit (see pages 25, 26, 107-110 of the transcript of the proceedings before the Association's board of Directors). Petitioner was in possession of a copy of the audit referred to in the Association's letter of March 13, 1963 as early as December 3, 1962 (page 97 of the transcript of the Association hearing), and had previously been advised of the details in the various schedules for which support was lacking at an earlier meeting of the board on or about November 2, 1962.

The hearing on the charges referred to in the Association's letter of March 13, 1963 was ultimately held on May 30, 1963 and resulted in a decision by the board as follows:

"CRESCENT RIVER PORT PILOTS ASSOCIATION

"The Board of Directors has considered the evidence offered at the hearing before the Board on Monday, May 20, 1963, and finds that the charges filed against Captain William L. Heuer Jr. on March 13, 1963 have been unequivocally proved.

Captain Heuer has refused to explain the unsupported expenditures referred to on pages 28

through 40 of the audit of F. W. Lafrentz & Co., and has relied upon the constitutional privilege against self-incrimination as a basis for refusing to tell his fellow-member pilots in a closed hearing of the Association what happened to $127,550.00.

In addition to the unexplained and unwarranted expenditure of $127,000.00, the audit is replete with expenditures for which Captain Heuer failed to submit any support or authority whatsoever. As an example, Captain Heuer rented a French Quarter apartment for "entertainment" purposes and charged it to transportation. He also incurred regular monthly expenses to one P. Cook without authority and has never satisfactorily explained what services this person performed for the association. Finally, it is clear that Captain Heuer expended on numerous occasions funds in excess of the authority of the Board of Directors.

In discharging its duties to the membership, this Board cannot overlook the fact that the audit reveals more than $200,000.00 of cash disbursements were made by Captain Heuer during his tenure as President of the Association for which no satisfactory explanation has ever been offered.

Considering all of the circumstances of this case, the Board has come to the unanimous conclusion that such disciplinary action as is authorized by the By-Laws and Rules of the Association should be invoked in this case, and it is the unanimous judgment of the Board that Captain Heuer be found guilty of conduct which is unbecoming a pilot in this Associaiton and which tends to bring discredit upon the Association and is prejudicial to its best interest, and that he should accordingly be suspended from the Association for a period of one year. It is the further unanimous judgment of this Board that Captain Heuer be assessed with the costs incident to the hearing of May 20, 1963.

/s Richard E. McNeely Pres.
/s Charles E. F. Arnoult Bd. Member
/s Paul Delesdernier V. Pres.
/s James H. Edwards, Jr. Bd. Member
/s Richard E. Walton Sec."

Petitioner, who served in a fiduciary capacity as president of the Association for the period covered by the audit, is attempting by these proceedings to maintain his right to continue as an active member of the Association in the face of his adamant refusal to explain to the membership of the Association what he did with the funds which are unaccounted for.

THE QUESTIONS PRESENTED

The questions presented are not as stated by petitioner. Petitioner bases his petition on the contention that the action of the Association was the action of the State of Louisiana. As a matter of fact, the Association is a private association, and has been so recognized by the Supreme Court of the State of Louisiana. The only questions presented by the issues in this case are (1) whether the private Association known as the Crescent River Port Pilots Association, which petitioner voluntarily joined, has the right to discipline its own members in an area involving the control of its internal affairs, and (2) whether under the facts of this case the Association has acted reasonably and fairly in conducting the hearing which resulted in petitioner's suspension.

ARGUMENT

Basic to petitioner's position in requesting this Court to act in his case is the contention that the State of Louisiana acts through the Crescent River Port Pilots'

Association and that the State has so acted herein to halt one of its own State officers in the performance of his occupation as a licensed pilot. The issues raised by this contention have long been settled. The formation of the Association is authorized by Statute. *La. Rev. Stat.* 34:995. This statute does not create the Association but merely authorized the creation. The mere legislative approval of the formation of such an Association does not make that association a creature of the State. In fact and in law, the Association is a private organization, existing with State approval but operating solely on a private basis with the right to select its members and to discipline its members pursuant to its charter and by-laws which have been in continuous existence (with necessary revision and amendment) since August 6, 1908, the date of the charter of the Association. It has been so held by the Louisiana Supreme Court, *Kotch v. Board of River Port Pilot Commissioners*, 209 La. 737, 25 So. 2d 527 (1946), and followed in the Courts of Appeal of Louisiana, *Fitzgerald v. Davis*, 160 So. 2d 345 (La. App. 1964). This Court has recognized the existence of such associations as the Crescent River Port Pilots' Association and has discussed their function as a private organization when this Court affirmed the *Kotch* case, 330 U.S. 552 (1947). Justice Black there stated at page 560 of 330 U.S. Rep'ts.,

> "The pilots were authorized to organize an association **whose membership they controlled** in order to enforce the legal regulations, and add to the efficiency of service required thereby." Citing *Levine v. Michel*, 35 La. Ann. 1131 (S. Ct. La., 1883) (emphasis supplied).

The charges which were brought against petitioner in the Association hearing concerned petitioner's fiduciary duties **to the Association** as its president. *La. Rev. Stat.*

12:36. He was asked to account to the membership for some $237,000.00 in expenditures for which he was responsible, over half of which was represented by checks payable **to his own account.**

At the hearing before the Association's Board of Directors, petitioner refused to answer the charges against him on the ground that his testimony might tend to incriminate him. The more than a quarter of a million dollars for which Heuer refused to account was not money belonging to the State of Louisiana. It was money belonging to the Association and the members thereof. Heuer's adamant refusal to testify after due notice and hearing regarding his handling of these Association funds was determined to be a breach of his fiduciary obligation to the Association which warranted suspension. *Louisiana Mortgage Corporation Inc. v. Pickens*, 167 So. 914 (La. App., 1936); *Hughs v. Department of Police*, 131 So. 2d.99 (La. App., 1961).

Heuer has been suspended, not expelled. He has not lost his membership in the Association. Membership in the Association, whether active or suspended, has no effect on Heuer's license as a pilot. This licence can be revoked only by the Governor who appointed him. *La. Rev. Stat.* 34:992. Opportunities for pilotage work are still open to Heuer, for instance, in coast-wise or river navigation. Heuer has numerous opportunities open to him to perform as a pilot. He has merely been suspended for one year from using the pilotage facilities of the Association.

Heuer voluntarily joined the Association. By so doing, he agreed to be bound by its Charter and By-laws which clearly authorize the Board of Directors of the Association to discipline its members. The By-laws and

Charter are an effective contract between the members and the Association, "* * * binding in every respect, and which they could not violate with impunity." *Lobdell v. Michel*, *supra*, 35 La. Ann. at page 1126.

Petitioner's various contentions by which he claims that he has been denied due process of law in the conduct of the Association's hearing are without merit.

It is true, as petitioner contends, that there will be a financial effect on the other members of the Association due to Heuer's suspension. This will amount to an additional income of approximately $380.00 for the entire year of the suspension for each of the other active members of the Association. The principle cited by petitioner in his brief operates to disqualify a court "* * * the judge of which has a **direct, personal, substantial** pecuniary interest in reaching a conclusion * * *." *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927). Respondent does not take issue with this principle. But the sum involved in this case can hardly be said to be **substantial** and can hardly be said to be **direct**, particularly when it is in direct proportion to the additional work which must be performed by each member, which work is assigned on an impartial, rotation basis for new and old members alike. Petitioner's argument, if correct, would preclude the authority of the Association to suspend anyone for any length of time at all.

Petitioner next contends that the fact that the Association filed a suit for an accounting against Heuer is conclusive of a showing of prejudice on the part of the Association's board members and a predetermination of the issues. It would be strange, indeed that an attempt on the part of the Association to require an accounting would be construed as such conclusive evidence of preju-

dice as to result in the inability of the Association to function under its by-laws. A reading of the transcript of the hearing shows that the Association made every effort to conduct itself in a fair and impartial manner.

It is contended by HEUER that the board of directors of the ASSOCIATION has violated a rule of the Board of River Port Pilot Commissioners which reserves to such board all disciplinary powers of pilots. It is difficult to believe that HEUER seriously urges this point. In the first place, Captain HEUER as president of the Board of River Port Pilot Commissioners convoked the meeting of the board which consisted of himself, one Richard J. Dietze and Charles P. Schwalb, Jr., for the obvious purpose of adopting an *ex post facto* provision to prevent the private ASSOCIATION of which he was a member from calling him to task for his failure to explain or account for the unsupported expenditures revealed by the F. W. Lafrentz & Co. audit. It is worthy of comment that the said Richard J. Dietze and Charles P. Schwalb, Jr., were members of the board of directors during HEUER'S tenure for the period covered by the audit and are two of the "witnesses" who refused to be sworn at the hearing. (pages 118, 119, of the Transcript of the Association's hearing). These members of the "HEUER Board of Directors" were themselves responsible for the numerous expenditures which HEUER made in excess of the board's authority as stated in Article XI of the Charter, if they were aware of them and acquiesced in them. The *ex post facto* nature of the rules adopted on May 11, 1963, would be answer enough to the contention HEUER now makes. In addition, however, the purported rules exceed the statutory authority of the Board of River Port Pilot Commissioners in that the only function of the board is as created by statute, and that function is limited to the examination of prospective pilots (La. Rev. Stat. 34:997) and the hear-

ing of complaints of conduct involving carelessness or incompetence in handling a vessel (La. Rev. Stat. 34:1001) or of conduct involving solicitation of business by a pilot (La. Rev. Stat. 34:1004). Since La. Rev. Stat. 34:995 specifically provides that river port pilots may form themselves into "an association as to them may seem fit," it is obvious that an association so formed has the right to adopt rules and regulations for the internal conduct of its affairs, particularly its financial affairs, without any interference whatsoever from the Board of River Port Pilot Commissioners.

In all aspects of the hearing, the Association acted in accordance with its by-laws and charter. The conclusion of the Association stated in its decision was responsive to the charges against petitioner in that he was found guilty of conduct which is unbecoming a pilot and which tends to bring discredit upon the Association, and which is prejudicial to its best interests.

The general rule in Louisiana, as in other states, is that the courts will not interfere with the internal affairs of an association so long as its affairs are conducted fairly and honestly and where the proceedings of the association are carried on after due notice to such persons as are concerned with said proceedings. *Elfer v. Marine Engineers Beneficial Association*, 154 So. 32, 179 La. 383 (S. Ct. of La. 1934); *State, ex rel. Rhodes Mortician & Undertaking Co. v. New Orleans Funeral Directors Association*, 108 So. 132, 161 La. 81 (S. Ct. of La. 1926); *Braden v. Lewis*, 88 So. 117, 148 La. 920 (S. Ct. of La. 1921); *Elfer v. Marine Engineers Beneficial Association*, 7 So. (2d) 409 (Ct. of App. of La. 1942); *Walsh v. New Orleans Cotton Exchange*, 188 La. 338, 177 So. 68; *New Founded Industrial Missionary Baptist Organization v. Anderson*, 49 So. (2d) 342 (La. App. 1950); *Crowder v.*

Dieu Nous Protege Benevolent Mutual Aid Association, 146 So. 710 (La. App. 1933); *Irwin v. Lorio*, 169 La. 1090, 126 So. 669 (1930); *State, ex rel. Breaux v. Longshoremen's Protective Union Benevolent Association, Local No. 231*, 123 So. 344 (La. App. 1929); *Fletcher Cyclopedia, Corporations*, Vol. 12 A, Section 5704, page 643.

CONCLUSION

The application does not involve a dispute arising out of "state action". This case is one in which a private association, acting under its charter and by-laws, has disciplined a member. If this disciplinary action had been taken without a fair and equitable hearing, petitioner would have a basis for complaint. The Association is quite willing to have its actions in this case closely examined in this regard, as it feels that the record clearly shows that every effort was made to accord petitioner a fair hearing before the Association suspended him.

Respondent prays that the petition for a writ of certiorari be dismissed.

Respectfully submitted,

S/

PETER H. BEER,
Counsel for Respondent.

MONTGOMERY, BARNETT,
BROWN & READ,
HENRY J. READ
DANIEL LUND,
806 National Bank of Commerce Bldg.,
New Orleans, Louisiana 70112,
Of Counsel.

CERTIFICATE

I certify that I have served a copy of this brief upon counsel for the petitioner, Mr. John M. Hofahan, this 22nd day of April, 1964.

s/ PETER H. BEER